STATE OF MICHIGAN
IN THE SUPREME COURT

**Appeal from the Court of Appeals**
**The Honorable Henry Saad, Michael Talbot, and Stephen Borrello, Presiding**

RICHARD COSTA and CINDY COSTA,

Plaintiffs-Appellants,

-vs-

COMMUNITY EMERGENCY MEDICAL SERVICES, INC., a Michigan corporation, DAVE HENSHAW, SCOTT MEISTER, DONALD FARENGER, and LISA M. SCHULTZ,

Defendant-Appellees.
_____/

Supreme Court Nos. 127334
127335

Court of Appeals Nos.
247983, 248104

Lower Court No. 02 202463 NH

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**DEFENDANTS-APPELLEES LISA SCHULTZ' AND DONALD FARENGER'S BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

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I. **Should this Court deny leave to appeal, or other relief, where the Court of Appeals correctly concluded that Schultz' and Farenger's conduct did not amount to gross negligence that was the proximate cause of Plaintiffs' injuries as a matter of law; and, that, therefore, they are statutorily immune from Plaintiffs' tort claims?**

The Court of Appeals concluded that Schultz' and Farenger's conduct did not amount to gross negligence as a matter of law.

Defendants-Appellees Schultz and Farenger answer "yes."

Plaintiffs-Appellants answer "no."

II. **Should this Court deny leave to appeal, or other relief, from the Court of Appeals' proper affirmance of the Trial Court's denial of Plaintiffs' motion for summary disposition or default, which motion was based on Schultz' and Farenger's failure to file an affidavit of meritorious defense?**

The Trial Court denied Plaintiffs' Motion for Summary Disposition or Default.

The Court of Appeals affirmed the Trial Court's ruling on this issue.

Defendants-Appellees Schultz and Farenger answer "yes."

Plaintiffs-Appellants answer "no."

## STATEMENT OF FACTS

This case arises out of the injuries that Richard Costa allegedly sustained in the Ramada Inn parking lot in Taylor, Michigan, during the late night of August 2, 1999 or very early morning hours of August 3, 1999. (Ex. A[1], Plaintiffs' Complaint, ¶ 8.)

At that time, Lisa M. Schultz was a licensed Emergency Medical Technician ("EMT") employed by the City of Taylor's Fire Department as a basic EMT. (Ex. B, L. Schultz' 9/5/02 Dep, pp 6-7.) Donald Farenger was a licensed paramedic employed by the City of Taylor's Fire Department. (Ex. B, p 42; Ex. C, D. Farenger's Dep., pp 5-6, 10.) As such, he had a position senior to Schultz. (Ex. B, pp 42-43.) Although Farenger was a paramedic in August of 1999, he could only act as a Basic EMT because his rescue unit was licensed as a Basic EMT unit. Schultz described a basic EMT as:

> Basic EMT is the basic life support, its CPR, some trauma. It's basically a little bit more advanced than first aid. (Ex. B, p 8.)

Robert Loreto, a veteran paramedic with the Taylor Fire Department, who was trained in advanced life support, explained the difference between a Basic EMT and a paramedic in his deposition. He explained that a Basic EMT can perform CPR and do basic bandaging, burn care and wound care, splinting of extremities, basic airways, and, if they have the equipment, they can do C-collars and backboards. (Ex. D, Excerpts of R. Loreto Dep., pp 83-84.) Paramedics can do everything that a Basic EMT can do, as well as EKG monitoring, intubation of patients, starting IV's, drug intervention, and providing narcotics if needed. (*Id.* at 84.)

In August of 1999, Schultz' and Farenger's unit was not a transporting unit. (Ex. B, pp 47, 189.) The City of Taylor had a contract with Community Emergency Medical Services,

[1] Exhibit and Deposition are abbreviated as Ex. and Dep., respectively, in this brief.

Inc. ("CEMS'), under which CEMS provided a more advanced equipped unit and a transporting unit. (Ex. B, pp 47, 51, 52.)

Costa resides in Colorado and came to Michigan on August 2, 1999 with his friend and business associate, Joe Baker, to buy cars. (Ex. A, ¶ ¶ 1, 8; Exhibit E, Richard Costa, Dep., p 22.) Costa does not remember anything about the events that gave rise to Plaintiffs' action after he boarded the plane in Denver. (Ex. E, p 24.)

Sometime after Baker and Costa's arrival in Michigan, Schultz and Farenger and their unit were dispatched to the parking lot of a Ramada Inn when their dispatch received a call indicating that there was a man down on the ground behind a vehicle. (Ex. B, p 54.)

"Man down" does not imply any certain thing about the condition of the patient. (Ex. F, R. Dunn Dep., p 48.) This information could refer to a man, woman or child and simply means that a person is not standing. (*Id.* at 44.) Somebody could accurately describe "man down" as somebody sitting in a chair. (*Id.* at 50, 53.)

Upon arrival at the Ramada Inn parking lot at 1:22 a.m. on August 3, 1999, Schultz and Farenger found Costa in the passenger seat of a car, with the seat reclined back somewhat. (Ex. B, pp, 62, 63.) It was not unusual for the actual scene to be totally different upon arrival than as reported in the 911 call. (Ex. B, p 132; Ex. C, pp 52, 123-124.)

Farenger did the initial patient survey while Schultz attempted to get information from Baker, who was really stressed out and agitated. (Ex. B, pp 53, 64-65.) Baker initially told Schultz that Costa had passed out. (*Id.* at 63.)

Farenger and Schultz informed Baker that they had received a report that a man was lying on the ground, but Baker adamantly denied that Costa was ever out of the car or lying on the ground. (*Id.* at 72-73.) Baker informed Schultz that Costa never moved out of the car. (*Id.*

at 126-127.) Baker appeared to think that it was an absurd idea that Costa was behind the car. (*Id.* at 126-127.)

Baker subsequently told Schultz and the Taylor Police that after drinking alcohol elsewhere and arriving at the hotel parking lot, Baker made a comment that caused Costa to "back hand" him and that, in return, Baker punched Costa in the face and that Costa had been unconscious ever since. (Ex. B, pp 61, 63, 68, 72-73, 85; Ex. G, Run Report; Ex. H, Taylor Police Report; Ex. I, C. Mize Dep, pp 66-68, 70-72; See also Ex. J. Schultz' Statement; Ex. K, Taylor Police Request for Warrant.) Plaintiffs' statement of fact in their Application that Farenger did not smell alcohol on Costa is inaccurate. In fact, in the deposition testimony that Plaintiffs refer to, Farenger actually testified that he did not smell alcohol on Baker. (Ex. C, pp 34-35.) Moreover, Baker gave information to Schultz that Costa had been drinking alcohol. (Ex. H.)

According to Baker, his altercation with Costa took place in the vehicle. (Ex. B, pp 72-73; Ex. J.) Baker demonstrated to Schultz a glancing blow by the nose area as how he punched Costa. (Ex. B, p 236.) Farenger understood from talking with Baker that the entire altercation had taken place inside the vehicle. (Ex. C, p 33.) The police report did not indicate that Costa had been struck outside of the vehicle or that he fell and hit his head on the ground. (Ex. H.) Baker did not tell Farenger that Costa had struck his head on the pavement or anything else. (Ex. C, p 130.)

There is no evidence that Baker told Schultz or Farenger that Costa had struck his head on the pavement before they arrived on the scene. In fact, as explained, Baker denied that Costa had been out of the vehicle when Baker punched him or afterwards. Based upon information at scene, there was no reason to suspect that Costa had a closed head injury. (Ex. B, p 194.)

Farenger observed a little bit of blood on Costa's nose, which appeared to be a minor injury. (Ex. C, pp 44, 137.) Costa was neither snoring, nor demonstrating snoring respirations, which can be associated with a serious head injury. (Ex. C, p 84.)

Baker informed the Taylor Police that he and Costa had consumed alcohol on the plane ride to Detroit and at the Playhouse Lounge, a strip club, before going to their hotel, the Ramada Inn. (Ex. H, Taylor Police Report.)

According to Farenger, Costa was somewhat conscious by the time that CEMS arrived and was giving slow verbal responses. (Ex. C, p 83.) Schultz, who, as explained was questioning Baker, and not ministering to Costa, mistakenly thought that Costa was still unconscious when the CEMS unit arrived. (Ex. B, p 68.) Schultz did not directly question Costa and was not involved in providing any medical care to him. (Ex. B, p 100.)

The evidence is undisputed that when the CEMS unit and employees arrived on the scene at about 1:27 a.m. after Schultz' and Farenger's unit, the CEMS unit became the primary unit on the scene because they were the higher-licensed unit. (Ex. B, p 190; Ex. C, pp 24, 68; Ex. D, pp 70-71; 88; Ex. L, HEMS Protocols.)

Plaintiffs' factual representations that Costa did not regain consciousness by Farenger's use of a sternal rub and painful stimulation are untrue. Farenger testified that Costa regained consciousness in a minute or less from the use of those techniques. (Ex. C, p 47.) In addition, it is not true that Schultz knew that CEMS employees tried unsuccessfully to wake Costa because she was at the back of the car talking with Baker. (Ex. B, pp 69-70.)

In fact, Farenger and/or CEMS employees were able to fully revive Costa with an ammonia stick. (Ex. B, pp 70, 88; Ex. C, pp 85, 93, 113.)

After Costa became conscious, Schultz heard Farenger ask Costa a long series of questions, all of which he was able to answer correctly. (Ex. B, pp 104, 237.) Costa did not have to think about his name, he knew that it was evening, he knew where he had been previously, and knew roughly that it was past that time. (*Id.* at 105.) Costa answered the questions in a relaxed conversational manner; he was not slurring his words and was not lethargic. (*Id.* at 116.)

After Costa was fully conscious, Farenger did not feel that he needed to be transported to the hospital for further evaluation. (Ex. C, p 93.)

Costa was, however, offered transport to a hospital, which he declined. (Ex. C, pp 99, 100.) As long as the patient is aware of person, place and time, he can refuse further medical treatment. (Ex. B, pp 116-117.) The only way that a paramedic can override the patient is if the paramedic does not think that the patient is competent to make the decision. (Ex. C, p 131.) Farenger believed that Costa was competent to refuse medical treatment based upon Costa's responses to his questions. (Ex. C, pp 61-62, 136.)

Costa signed a Refusal of Treatment Form. (Ex. G, Run Report, p 2.) After that form was signed, the emergency workers' hands were tied and they could not transport him unless it was determined that he was incompetent. (Ex. C, p 130, 133.)

A police officer told Costa and Baker that they had to get a hotel room and that if Costa could walk to the hotel, he would not be taken to a hospital. (Ex. B, pp 117-118.) Baker helped Costa a bit, but Costa walked himself toward the hotel. (*Id.* at 118.)

Schultz and Farenger then left the scene at about 1:30 a.m., followed by CEMS.

About six hours later, at 7:23 a.m., Baker was apparently unable to awaken Costa. A second 911 call was placed. At 7:26 a.m., a second rescue team arrived to find Costa

unconscious in bed and lying in his own vomit. When the rescue personnel could not revive Costa, Baker apparently advised them that Costa had fallen backward and struck his head on the concrete. As discussed above, there is no evidence that, prior to or during the first 911 call, Baker ever informed Schultz, Farenger or anyone else that Costa had fallen backwards and struck his head on concrete.

A physical examination taken after the second 911 call revealed a hematoma and a small depression on the back of Costa's head. Costa was then taken the hospital while unconscious.

Plaintiffs discussed this second emergency call, but did not present any evidence as to when or how the depression on the back of Costa's head got there.

Today, Richard Costa claims that he suffers from neurological problems, due to the injury to the back of his head and seeks to impose liability for those problems on Schultz, Farenger, CEMS, and CEMS's employees, Dave Henshaw and Scott Meister. Costa and his wife filed this cause of action on January 22, 2002, alleging medical malpractice against Schultz, Farenger, CEMS, Henshaw and Meister.

Schultz filed a motion for summary disposition, asserting that, under the governmental immunity act, MCL 691.1407, she is immune from Plaintiffs' tort action because she was not grossly negligent and her conduct was not "the" proximate cause of Richard Costa's injury. Farenger joined in that motion.

On April 1, 2003, the Trial Court ruled that it was denying the motion by stating:

> The fact that Mr. Costa was not taken by the EMS technicians for medical treatment raises a question of fact whether there's gross negligence and whether the lack of treatment made the injury more severe. So the motion is denied. (Ex. M, Transcript of April 1, 2003 Hearing, p 15.)

Plaintiffs also filed a motion for summary disposition or default based on Schultz' and Farenger's failure to file an affidavit of meritorious defense. The Trial Court denied that motion and gave Schultz and Farenger thirty days to file the affidavits. (Ex. M, p 21.)

The Trial Court also denied the motion for summary disposition that the Co-Defendants CEMS, Dave Henshaw and Scott Meister filed.

On April 7, 2003, Judge Gillis entered the order in the Wayne County Circuit Court that denied all of the summary disposition motions.

Schultz then filed a timely appeal of right and Farenger and Plaintiffs filed timely cross appeals in the Court of Appeals, which were docketed as No. 247983. CEMS, Henshaw and Meister filed an Application for Leave to Appeal in the Court of Appeals, which that Court docketed as No. 248104 and granted. Plaintiffs filed another cross appeal after that Application was granted. The Court of Appeals then consolidated the appeals.

The Court of Appeals held its hearing on the parties' appeals on June 1, 2004. Because they had not filed timely briefs and the Court of Appeals denied their motion for oral argument, Plaintiffs did not present any arguments at the hearing.[2] On August 9, 2004, which was more than two months after the appeal hearing and only a few weeks before the Court of Appeals issued its opinion in this case, the Plaintiffs filed their appellees' appeal brief in Docket No. 247983, which was in Schultz' appeal and Farenger's cross appeal.

The Court of Appeals issued its opinion in the consolidated appeals on September 21, 2004. Plaintiffs attached a copy of that opinion to their Application for Leave to Appeal as their Exhibit A.

[2] The Court of Appeals ordered that Plaintiffs' counsel could appear at the hearing to answer any questions that the Court might have. The undersigned counsel does not recall the Court asking him any questions.

In Docket No. 247983, the Court of Appeals held that, "the trial court improperly denied summary disposition because of governmental immunity where plaintiffs did not present any allegations or evidence tending to establish defendants' gross negligence in treating Costa." (Plaintiff's Exhibit A, p 3.) That Court reasoned and concluded as follows:

> Plaintiffs alleged that the defendants Farenger and Schultz failed (1) to assess Costa's vital signs; (2) to conduct a physical examination of Costa while he remained unconscious; (3) on Costa's regaining of consciousness, to properly assess his competence to refuse treatment; (4) to explain to Costa the potential consequences of his refusal of treatment; and (5) to transport Costa to a hospital. Farenger and Schultz arrived on the scene after receiving dispatch information about a man lying unconscious in a parking lot. When they arrived, within four minutes of the dispatch, they found Costa reclined in the passenger seat of a vehicle. Costa's co-worker, Baker, adamantly denied that Costa ever laid on the ground, but admitted that Costa became unconscious after Baker punched him in the face. Baker believed that Costa had ingested four scotch and waters, but Farenger did not smell alcohol emanating from Costa. Farenger and Schultz observed a small spot of blood on one of Costa's nostrils. Although Costa did not immediately respond to Farenger's voice or to a painful stimulus, he became coherent after an ammonia inhalant was placed under his nose and correctly answered a series of questions to gauge his level of consciousness and mental capacity. Costa appeared competent to refuse treatment, signed a form refusing further treatment, and walked into the hotel where he was staying.
>
> Despite plaintiffs' references in their complaint to "gross negligence," we find that the allegations here sound only in ordinary negligence. See *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). No reasonable juror could have found that Farenger and Schultz behaved so recklessly "as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); *In re Estate of Jeremy Allen Tarlea*, [263] Mich App [80]; [687] NW2d [333] (Docket No. 244330, issued July 13, 2004, slip op at 8.) Further, given the undisputed evidence that Baker punched Costa in the face and knocked him down before Farenger and Schultz arrived on the scene, reasonable jurors could not have found that Farenger's and Schultz' actions were the proximate cause of Costa's injuries. *Robinson* [*v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000)]; *Tarlea, supra*. The trial court improperly denied Farenger's and Schultz' motion for summary disposition on the basis of governmental immunity. (Plaintiffs' Exhibit A, p 4.)

With respect to Plaintiffs' cross appeal from the Trial Court's decision to give Schultz and Farenger additional time to file their affidavits of meritorious defense, the Court of Appeals found no abuse of discretion, reasoning and concluding as follows:

> In both Docket Nos. 247983 and 248104, plaintiffs argue on cross appeal that the trial court erred in denying their motion for summary disposition or default, which was based on Farenger's and Schultz' failure to comply with the statutory requirement to file an affidavit of meritorious defense, MCL 600.2912e. This Court has more than once rejected assertions, similar to plaintiffs,' that a medical malpractice defendant's failure to file an affidavit of meritorious defense pursuant to MCL 600.2912e mandates a default or other preclusion of the defendant from presenting a defense, and plaintiffs present no authority to the contrary. *Kowalski v Fiutowski*, 247 Mich App 156, 161-163, 165-166; 635 NW2d 502 (2001); *Wilhelm v Mustafa*, 243 Mich App 478, 483-486; 624 NW2d 435 (2000). Here, the trial court gave Schultz and Farenger additional time to file their affidavits, and we find no abuse of discretion. *Id.* (Plaintiffs' Exhibit A, p 5.)

Despite not defending against Schultz' appeal and Farenger's cross appeal during the pre-hearing and hearing phase in the Court of Appeals, Plaintiffs now seek leave to appeal in this Court or alternative peremptory relief. For the reasons stated in the Court of Appeals' opinion and this brief, this Court should deny Plaintiffs the relief that they seek.

## STANDARDS OF REVIEW

Appellate courts review orders denying summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Defendants' Motion for Summary Disposition based upon the governmental immunity statute was brought under MCR 2.116(C)(7). MCR 2.116(C)(7) tests whether a claim is barred because of statutory immunity. *Steele v Dept of Corrections*, 215 Mich App 710, 712-713; 546 NW2d 725 (1996), lv den 454 Mich 853 (1997). "In order to survive a motion for summary disposition based on governmental immunity, the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Id.*

In motions for summary disposition brought under MCL 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001), citing *Maiden*, *supra* at 119. "If a party supports a motion under MCR 2.116(C)(7) by submitting affidavits, depositions, admissions, or other documentary evidence, those materials must be considered." 247 Mich App at 82, citing MCR 2.116(G)(5); *Maiden*, *supra*. The substance or content of the supporting materials must be admissible into evidence. 247 Mich App at 82, citing *Maiden*, *supra*.

Application of these standards of review in this case establish that the Court of Appeals properly concluded that the Trial Court erred by denying Schultz' and Farenger's Motion for Summary Disposition because those Defendants are immune from tort liability as provided in MCL 691.1407(2). The Court of Appeals also properly concluded that the Trial Court did not err by denying Plaintiffs' Motion for Summary Disposition or default and did not abuse it discretion by giving Schultz and Farenger 30 days to file their affidavits of meritorious defense.

## ARGUMENTS

**I. This Court should deny leave to appeal, or other relief, where the Court of Appeals correctly concluded that Schultz' and Farenger's conduct did not amount to gross negligence that was the proximate cause of Plaintiffs' injuries as a matter of law; and, that, therefore, they are statutorily immune from Plaintiffs' tort claims.**

The Court of Appeals correctly concluded that MCL 691.1407(2) bars Plaintiffs' tort claims against Lisa Schultz and Donald Farenger. That statute provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, **each** officer and **employee of a governmental agency**, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency **is immune from tort liability for an injury to a person** or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental **agency if all of the following are met**:
>
> (a) **The** officer, **employee**, member, or volunteer **is acting or reasonably believes he or she is acting within the scope of his or her authority**.
>
> (b) **The governmental agency is engaged in the exercise or discharge of a governmental function**.
>
> (c) **The** officer's, **employee's**, member's, or volunteer's **conduct does not amount to gross negligence that is the proximate cause of the injury** or damage. **As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.** (Emphasis added.)

The Court of Appeals correctly held that all three of the conditions for affording Schultz and Farenger immunity under MCL 691.1407(2) are present in this case.

### A. Schultz and Farenger were governmental employees acting within the scope of their authority.

Plaintiffs' Complaint alleges that Schultz and Farenger were on the Taylor Fire Department's EMT Team and were "Taylor EMS Paramedics" who responded to the Taylor Police Department dispatcher's call that resulted in treatment to Richard Costa on August 3,

1999. (Ex. A, ¶ ¶ 9, 10, 11.) In addition, there is no dispute that Schultz and Farenger were employed by the City of Taylor Fire Department, as an emergency medical technician and a paramedic/EMT, respectively, and that they were acting as a City of Taylor's emergency service personnel pursuant to state law and licensure. (Ex. B, pp 6-7, Ex. C, pp 5-6, 10.) Plaintiffs did not allege that Defendants Schultz and Farenger were not "acting within the scope of their authority." (Ex. A.) Plaintiffs did not dispute these facts in the Court of Appeals' brief and do not dispute them in their Application for Leave to Appeal. Thus, the Court of Appeals did not err by concluding that the first condition for finding that Schultz and Farenger are immune from Plaintiffs' tort claims clearly exists in this case. (Plaintiffs' Ex. A, p 4.)

**B. The City of Taylor was engaged in the exercise or discharge of a governmental function.**

The second condition for finding immunity under MCL 691.1407(2) also exists. MCL 691.1401(f) defines "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."

Plaintiffs did not contend that the City of Taylor was not exercising or discharging a governmental function in the operation of its emergency medical unit when Schultz and Farenger were dispatched to the Ramada Inn on August 2, 1999. (Ex. A.) In addition, in *Omelenchuck v City of Warren*, 466 Mich 524, 525-526, 531; 647 NW2d 493 (2002), this Court held that "it is beyond reasonable dispute," that the city's fire department was discharging a governmental function when it provided emergency medical vehicles and personnel to assist the plaintiff after he suffered a heart attack. Similarly, the City of Taylor's Fire Department was discharging a governmental function when its Fire Department provided an emergency medical vehicle and personnel, Schultz, an EMT, and Farenger, a paramedic/EMT, to assist Costa after he became

unconscious. In their Court of Appeals' brief and their present Application for Leave to Appeal, Plaintiffs did not dispute that the City of Taylor was engaged in a governmental function. Thus, the Court of Appeals properly concluded that the second condition for finding that governmental immunity bars Plaintiffs' tort claims against Schultz and Farenger also exists.

Thus, to avoid the immunity from tort liability afforded to Schultz and Farenger, Plaintiffs were required to plead and prove that their conduct amounted to "gross negligence that is the proximate cause of Plaintiffs' injuries." MCL 691.1407(2)(c).

### C. Schultz' and Farenger's conduct does not amount to gross negligence that is the proximate cause of Costa's injuries.

#### 1. The Court of Appeals properly held that Schultz' and Farenger's conduct does not amount to "gross negligence" as a matter of law.

The Court of Appeals properly concluded that Plaintiffs' allegations and evidence sound only in ordinary negligence and that no reasonable juror could have found that Farenger and Schultz behaved so recklessly "as to demonstrate a substantial lack of concern for whether an injury results." (Plaintiffs' Exhibit A, p 4, citing MCL 691.1407(2)(c); *In re Estate of Jeremy Allen Tarlea*, 263 Mich App 80; 687 NW2d 333 (2004).)

There is no merit to Plaintiffs' claim that the Court of Appeals erred because it allegedly treated this case as if it was reviewing a motion filed under MCR 2.116(C)(8). The Court of Appeals held:

> In Docket No. 247983, defendants Farenger and Schultz argue on appeal that the trial court improperly denied summary disposition because of governmental immunity where plaintiffs did not present any allegations **or evidence** tending to establish defendants' gross negligence in treating Costa. **We agree.** (Emphasis added.) (Plaintiffs' Exhibit A, p 3.)

Thus, the Court of Appeals considered Schultz' and Farenger's arguments that the pleadings *and the evidence* failed to establish gross negligence. Furthermore, in its analysis of the gross negligence issue, the Court of Appeals considered evidence presented by the parties as well as the allegations in Plaintiffs' Complaint. (*Id.* at 4.)

In addition, appellate courts may consider whether summary disposition is appropriate under different court rules than relied upon in the trial court. See, *Ginther v Zimmerman*, 195 Mich App 647, 649; 491 NW2d 282 (1992). Furthermore, to the extent it did so, the Court of Appeals was not precluded from granting summary disposition on the pleadings because Plaintiffs had the burden of pleading facts in avoidance of governmental immunity and failed to do so. *Hunley v Phillips*, 164 Mich App 517, 526; 417 NW2d 485 (1987); See also, *Mack v City of Detroit*, 467 Mich 186, 198-199; 649 NW2d 47 (2002).

Plaintiffs' contention that the Court of Appeals' "entire approach to the gross negligence issue presented in this case was horribly flawed" has no merit and does not provide a ground for granting their Application for Leave to Appeal.

Summary disposition is appropriate where, as here, reasonable jurors could not differ on the question of whether a government employee's conduct amounted to gross negligence. See, *Harris v University of Michigan Bd of Regents*, 219 Mich App 679, 694; 538 NW2d 225 (1996). Analysis of the "gross negligence" issue requires analysis of the statutory definition of gross negligence, which is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c).

As the Court of Appeals correctly concluded in this case, evidence of ordinary negligence does not create a material question of fact concerning gross negligence. (Plaintiffs' Exhibit A, p 4, citing *Maiden v Rozwood*, 461 Mich at 122-123.)

Plaintiffs contend that Schultz and Farenger were grossly negligent because they failed to perform additional medical investigative procedures and failed to transport Costa to the hospital despite his refusal of further medical treatment. Schultz and Farenger clearly were not, and could not be, grossly negligent in not transporting Costa to a hospital because it is undisputed that they were not a transporting unit. (Ex. B, pp 47, 189.) It is undisputed that the City of Taylor had a contract with CEMS, under which CEMS provided a more advanced and equipped transporting unit to the scene of Costa's injury. (*Id.* at 47, 51, 52.) When the CEMS unit arrived on the scene, they became the primary unit *for providing care and transportation*. (Ex. B, p 190; Ex. C, pp 24, 68; Ex. D, pp 70-71, 88; Ex. L, HEMS Protocols.) Moreover, allegations or evidence of failure to provide additional care or transportation amounts to only ordinary negligence.

In *Jackson v County of Saginaw*, 458 Mich 141, 151; 580 NW2d 870 (1998), this Court held that it could not conclude it reasonable to find that the defendant doctor's failure to refer the plaintiff for a laryngoscopic examination sooner could demonstrate a substantial lack of concern for whether an injury results. Plaintiffs seek to distinguish *Jackson* from this case because the defendant in that case continued to treat the plaintiff with a variety of medications and tests. *Jackson* is not materially distinguishable because it is undisputed here that Farenger and/or CEMS continued to treat Costa until he was fully conscious and Costa declined further medical treatment after exhibiting competent behavior to decline treatment. (Ex. B, pp 104, 105, 237; Ex. C, pp 61-62, 136, Ex. G, Run Report, p 2.)

Moreover, *In re Estate of Jeremy Allen Tarlea*, 263 Mich App at 90, the Court of Appeals explained:

> Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra

> precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.
>
> The much less demanding standard of care—gross negligence—suggests, instead, almost a willful disregard of precautions or measures to attend to the safety and a singular disregard for substantial risks. It is as though, if an objective observer, watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge.

The Court of Appeals did not err in this case by concluding that the Plaintiffs did not present any allegations or evidence from which a reasonable person could conclude that the Defendants were grossly negligent in treating Costa. There is no evidence from which an objective observer reasonably could conclude that Schultz and Farenger did not care about Costa's safety or welfare.

In *Pavlov v Community Emergency Medical Service, Inc*, 195 Mich App 711; 491 NW2d 874 (1992), the Court of Appeals reviewed claims similar to those in the instant case, that is, a claim for injury arising out of the acts or omissions of emergency services personnel. In that case, a 911 call was placed after Pavlov, who had been consuming alcohol and swimming, began experiencing shortness of breath. 195 Mich App at 713. An EMS unit was then dispatched to the scene, where the EMS crew found Pavlov lying down and complaining of shortness of breath and pain radiating down his left arm. *Id.* The EMS crew gave him oxygen. *Id.* An advanced EMS team arrived and performed an EKG. *Id.* The results were normal. *Id.* The oxygen mask was removed and Pavlov appeared to improve. *Id.* When asked if a doctor should see him, defendants replied that a doctor should. *Id.* Pavlov said that his family would take him and he signed a release form, waiving transportation to a hospital. *Id.* Almost immediately after the

EMS crews left, Pavlov suffered full cardiac arrest. *Id.* Efforts to resuscitate Pavlov were unsuccessful and he died. *Id.*

Plaintiffs brought suit against the advanced EMS team, alleging that their act of removing the oxygen mask constituted willful misconduct. *Id.* at 715. The Court of Appeals concluded that plaintiffs' complaint sounded only in ordinary negligence because it accused the defendants of "failing to properly assess [the decedent's] condition," "failing to provide emergency medical treatment," and generally failing to use "ordinary care."[3] *Id.* at 717-718.

Concurring, Judge Kelly concluded that plaintiff "failed to supply a factual basis for treating the advanced emergency medical technicians as being guilty of 'conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Id.* Judge Kelly reasoned as follows:

> The most critical fault plaintiff has to offer is that the removal of the oxygen mask was fatal, but the medical reason for that removal is easily explicable as reasonable treatment for hyperventilation, for which the use of oxygen is contraindicated. No testimony supports the inference that the fire department EMS team, which were the first arrivals, were any better equipped to afford medical diagnosis and emergency treatment than the advanced EMS team; that the latter was misguided, misled, abused, or confused by the former; that the EKG or other tests were grossly misinterpreted, or that Messrs' Latrielle and Newell made anything more than a commonplace medical misjudgment. *Id.* at 724. (Kelly, J concurring.)

In *Ingesoulian v City of Lincoln Park*, Docket No. 226778, rel'd 2/5/02, a copy of which is attached as Exhibit N, the Court of Appeals also reviewed claims analogous to Plaintiffs' gross negligence claims in this case and concluded that summary disposition in defendants' favor was

[3] The majority opinion also concluded that the plaintiffs failed to plead or present evidence of "gross negligence" as that concept was defined at common law, i.e. subsequent negligence. *Id.* at 719. Judge Michael Kelly concurred in the result, but would have applied the statutory definition of gross negligence that is at issue in the instant case. *Id.* at 723, (Kelly, J, concurring.)

appropriate. Although *Ingesoulian* is an unpublished opinion, this Court can and should consider it persuasive authority because the facts and issues are analogous to those in the instant case. See, *Steele v Dep't of Corrections*, 215 Mich App at 714-715.

In *Ingesoulian*, the Court of Appeals held that, "[t]he acts or omissions of an emergency medical technician do not give rise to liability unless the acts or omissions are the result of gross negligence or willful misconduct." (Ex. N, p 1, citing MCL 333.20965(1).) Plaintiffs alleged that the defendants were grossly negligent and submitted an expert witness's affidavit, which stated that the defendants breached the applicable standard of care in treating plaintiff and that their breach constituted negligence and/or gross negligence. (Ex. N, p 1.)

The Court of Appeals held that:

> Negligence is the breach of duty, which is 'obligation to conform to a specific standard of care toward another as recognized under law.' *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). Therefore, the expert's affidavit, which stated that defendants violated the applicable standard of care, provided evidence of ordinary negligence alone. "Evidence of ordinary negligence does not create a material question of fact concerning gross negligence. Rather a plaintiff must adduce proof of conduct 'so reckless as to demonstrate a substantial lack of concern for whether an injury results.' *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999.) (Citations omitted by Court.) (Ex. N, p 1.)

That Court then reviewed the evidence and concluded that it failed to establish "gross negligence." *Id.* at 1-2. The Court explained its reasoning as follows:

> **The evidence showed that prior to their arrival on the scene, [defendants] Rusek and Dyer did not know that Ingesoulian had hit his head.** There was a question of fact whether they were so informed upon their arrival, but they were never told he had been unconscious. Regardless, Rusek attempted to examine Ingesoulian, but he was uncooperative and refused to let Rusek do anything other than a superficial examination, declining to have his blood pressure or vital signs taken. **He adamantly refused transportation to a hospital and insisted on going in his house. Despite his fall, Ingesoulian was coherent, had no obvious injuries apart from signs of intoxication, and could walk unaided. While Rusek and Dyer may have been negligent in failing to insist upon a more complete physical examination or transportation to a hospital, their conduct**

> **did not 'demonstrate a substantial lack of concern for whether an injury results' and plaintiff's expert's statement that defendants' violation of the applicable standard of care constituted gross negligence did not make it so.** *Maiden, supra* at 129, n 11. Therefore, the trial court did not err in finding that the evidence did not establish a genuine issue of fact concerning gross negligence. (Emphasis added.) Ex. N, pp 1-2.

Here, Schultz and Farenger knew that Costa was unconscious, but did not know that he allegedly had hit his head on pavement. Costa refused transportation to a hospital after he appeared fully mentally competent to make that decision. Farenger's failure to make a more complete physical examination and the emergency workers' failure to transport Costa to a hospital does not "demonstrate a substantial lack of concern for whether an injury results."

The *Ingesoulian* Court also held that mere negligence cannot be cast as willfulness simply for the purposes of bringing a complaint and that willfulness manifests an intentional disregard of another's safety. Ex. N, p 2.

In the instant case, Plaintiffs allege that Schultz and Farenger breached the standards of care that they owed to Costa. (Ex. A, ¶ 28.) These allegations, like those in *Ingesoulian*, constitute allegations of "ordinary negligence," which do not suffice to plead gross negligence. Ex. N, p 1, citing *Smith v Stolberg*, *supra* at 258.

Plaintiffs filed Affidavits of Merit of Richard Dalton, R.N. of Wisconsin and Stanley M. Zydlo, M.D. in support of their action and in response to Schultz' and Farenger's Motion for Summary Disposition. Copies of those affidavits are attached as Ex. O and P.

Dalton's Affidavit stated his opinion concerning the standard of care applicable to the responding EMS personnel. (Ex. O, ¶ 2.) Dalton's Affidavit then gave the following preliminary opinion, which was made without review of any deposition testimony:

> It is further my opinion that, under the circumstances that existed in this case, **the conduct of the EMS personnel in breaching the standard of care – and, in**

> **particular, their failure to take vital signs and do a cursory physical examination which, in retrospect, would have demonstrated his skull fracture and need for immediate medical treatment – amounted to either willful misconduct or gross negligence.** In other words, the EMS personnel had to either deliberately ignore Mr. Costa's need for immediate medical treatment or they were grossly negligent in failing to recognize it and act on it by performing a perfunctory physical exam and taking his vital signs during his period of unconsciousness, and then, in subsequently, attributing the unconsciousness and difficulty they had awakening him to alcohol intoxication, **in light of the history that they had**. (Emphasis added.) (Ex. O, ¶ ¶ 3, 4.)

Dr. Zydlo's Affidavit is virtually identical to Dalton's Affidavit. (Ex. P, ¶ ¶ 2, 3.) In addition, Dr. Zydlo also opined that if EMS personnel had properly assessed and transported Costa to an emergency room, his injury would have been diagnosed and treated, and under those circumstances, it is highly probable that he would have made a complete recovery. (*Id.* at ¶ 4.)

As in *Ingesoulian*, Plaintiffs' experts' statements that Schultz and Farenger breached their standard of care allege only ordinary negligence. In addition, the fact that those experts alleged that those breaches of care constituted willful misconduct or gross negligence does not make it so. Ex. N, pp 1-2, citing *Maiden, supra* at 129, n 11. As this Court explained in *Maiden, supra*, whether the statutory standard of care was violated is a legal conclusion to which the opinion of an expert does not extend.

Moreover, the alleged history that Dalton and Zydlo appear to rely upon for their opinions is the assumption that the emergency service personnel who responded to the scene knew that Costa had allegedly hit his head on the pavement prior to the first 911 call. There is no evidence in the record that they or any of the other responders knew that Costa had done so prior to the time that they arrived on the scene as a result of the first 911 call. In fact, there is no evidence in the record that Costa hit his head on the pavement *prior* to Schultz' and Farenger's arrival on the scene after the first 911 call.

The evidence is undisputed that Schultz and Farenger received a report from their dispatcher of a "man down" in the Ramada Inn parking lot. However, the evidence is also undisputed that it was not unusual that, upon arrival, the actual scene is totally different than as reported in the 911 call. (Ex. B, p 132; Ex. C, pp 52, 123-124.) Moreover, according to the City's dispatcher on duty on August 3, 1999, "man down" does not imply a certain thing about the condition of a patient. (Ex. F, p 48.) Such information can refer to a man, woman, or child and simply means that the person is not standing. (*Id.* at 44.) Somebody could accurately describe a "man down" as somebody sitting in a chair, or here, a car. (*Id.* at 50, 53.) Thus, the report of a "man down" did not inform Schultz or Farenger that Costa had hit his head on the pavement.

In addition, upon arrival at the scene, Farenger and Schultz informed Baker that they had received a report that a man was lying on the ground, but Baker adamantly denied that Costa was ever out of the car or lying on the ground. (Ex. B, pp 72-73.) In addition to informing Schultz that Costa had never moved out of the car, it appeared to Schultz that Baker thought it was absurd to think that Costa had been behind the car. (*Id.* at 126-127.)

Baker initially informed Schultz that Costa had passed out after drinking alcohol. (*Id.* at 63.) Baker subsequently admitted to Schultz that he had punched Costa in the face, but demonstrated the "punch" as a glancing blow by the nose area and indicated that this altercation took place inside the car. (*Id.* at 61, 63, 68, 72-73, 85, 236; Ex. J.) Baker did not tell Farenger that Costa had struck his head on the pavement or anything else. (Ex. C, p 130.) Farenger observed a little bit of blood on Costa's nose, which appeared to be a minor injury and was consistent with Baker's recitation of the events. (*Id.* at 44, 137.)

Furthermore, the police report did not indicate that Costa had been struck outside the vehicle or that he had fallen and hit his head on the ground. (Ex. H.)

It was not until after the second 911 call, about six hours later, that Baker apparently told the responding emergency medical service providers that Costa had previously hit his head. The time and place of that alleged occurrence is not identified in the record. Plaintiffs merely assume that it was in the Ramada Inn parking lot and was before Schultz and Farenger arrived after the first 911 call.

Thus, there is no evidence that Schultz or Farenger knew or should have known that Costa had hit his head on the pavement before becoming unconscious. Thus, there is no factual basis for Plaintiffs' experts' assumptions concerning Schultz' and Farenger's alleged knowledge of that alleged event. In fact, the undisputed evidence is contrary to those unsubstantiated assumptions.

In addition, Plaintiffs' experts, like Plaintiff Ingesoulian's expert, merely preliminarily opined that Schultz and Farenger breached alleged standards of care to Costa, which are opinions concerning "ordinary negligence." See, Ex. N, p 1. Therefore, Plaintiffs' experts' affidavits do not create a material issue of fact that Schultz' and Farenger's conduct constituted gross negligence. *Id.* at 1-2.

Furthermore, like the situation in *Pavlov* and *Ingesoulian*, Plaintiffs failed to supply a factual basis for their allegations that Schultz and Farenger are guilty of conduct so reckless as to demonstrate a substantial lack of concern for whether an injury would result to Costa.

As explained above, the evidence is undisputed that Schultz and Farenger did not know that Costa allegedly hit his head on pavement prior to their arrival on the scene. In addition, the evidence is undisputed that Schultz took a history from Baker to determine what happened and

that Farenger and/or CEMS employees treated Costa until he regained consciousness and was able to accurately give information to Farenger on several occasions. (Ex. B, pp 53, 64-65, 70, 88, 104, 105, 237; Ex. C, pp 85, 93, 113.) In doing so, Costa did not have to think about his name, he knew that it was evening, he knew where he had been previously, and roughly knew that it was past that time. (Ex. B, p 105.) After regaining consciousness, Costa answered the emergency personnel's questions in a relaxed conversational manner and was not slurring his words or lethargic. (*Id.* at 116.)

Farenger's undisputed testimony is that Costa was not snoring nor demonstrating snoring respirations, which can be associated with a serious head injury. (Ex. C, p 84.) After Costa became fully conscious, Farenger did not think that it was necessary for Costa to go to the hospital. (*Id.* at 93.) Costa appeared to him to be fully coherent and competent. (*Id.* at 128.)

Costa was, however, offered transportation to a hospital but he declined and signed a refusal of medical treatment form. (Ex. C, pp 99, 100; Ex. G, Run Report, p 2.) Farenger believed that Costa was competent to refuse medical treatment based upon Costa's answers to his questions. (Ex. C, pp 61-62, 136.) Plaintiffs did not present any evidence that Costa did not appear competent to make that decision.

Moreover, as explained, Schultz' and Farenger's unit was not a transporting unit. (Ex. B, pp 47, 189.) As also explained, when Costa signed the refusal of medical treatment form, the primary unit for Costa's care and transportation was the higher-licensed CEMS unit, which was equipped to transport him, and CEMS personnel, not Schultz and Farenger and their basic EMS unit. (Ex. B, p 190; Ex. C, pp 24, 68; Ex. D, pp 70-71, 88; Ex. L, HEMS Protocols.) Thus, Schultz and Farenger did not have authority to determine whether Costa would receive further medical treatment or be transported to a hospital.

In addition, a police officer told Costa and Baker that they had to get a hotel room and that if he could walk to the hotel, he would not be taken to the hospital. (Ex. B, pp 117-118) Baker helped Costa a bit, but Costa walked himself toward the hotel. (*Id.* at 118.)

No reasonable juror could conclude that this evidence establishes that Schultz or Farenger intended to harm Costa or were so reckless as to demonstrate a substantial lack of concern for whether an injury to Costa would result.

Plaintiffs mistakenly rely upon this Court's opinion in the case consolidated with *Maiden* v *Rozwood*, *supra*, that is, *Reno v Chung*. That case bears no similarity to the instant case. In *Reno*, Plaintiff Reno discovered that his wife and daughter had been brutally stabbed. 461 Mich at 116. When Reno found them, his wife was dead, but he told police that his daughter had identified Tommy Collins as their assailant. *Id.* However, after a Wayne County assistant medical examiner, Dr. Chung, opined that the stab wounds in the daughter's neck prevented her from speaking, police arrested Reno and charged him with the murders. *Id.* After Dr. Chung testified at plaintiff's preliminary examination that because of her throat injuries, Reno's daughter could not have implicated Collins, Reno was bound over for trial. *Id.*

In preparing for Reno's criminal trial, the prosecutor consulted with pathologist Dr. Simon and otolarynologist Dr. Mathog to corroborate Dr. Chung's opinion, but Dr. Chung refused to turn over her records and specimens to the prosecutor, requiring the prosecutor to obtain a court order for those items. *Id.* at 116-117. Instead of corroborating Dr. Chung's opinion, both experts stated that her findings and conclusions were completely wrong. *Id.* at 117. Therefore, the prosecutor dismissed the criminal charges against Reno. *Id.*

Reno then sued Dr. Chung, alleging that she owed him a duty and that her conduct was grossly negligent. *Id.* Unlike the situation here, Reno's gross negligence claim was not based on a failure to provide additional treatment or a failure to transport a patient to a hospital.

This Court ultimately concluded that Dr. Chung did not owe Reno a duty and that summary disposition was appropriate. *Id.* at 135. In dicta, this Court also concluded that Reno's experts had presented a question of fact on the issue of whether Dr. Chung was grossly negligent. In doing so, this Court reviewed Dr. Simon's affidavit, which stated that Dr. Chung's testimony was erroneous and not consistent with the laryngeal injuries that she recorded. *Id.* at 128. The Court also reviewed Dr. Mathog's affidavit, which stated that there is no physiological or medical basis for Dr. Chung's assertion that Reno's daughter could not have spoken with her injuries. *Id.* at 129.

This Court then reasoned and concluded as follows:

> Defendant [Chung]'s erroneous conclusion regarding the victim's ability to speak before she died was the key factor leading to plaintiff's arrest. The assistant prosecutor testified in his deposition that defendant's medical opinion was 'the most important part of my decision-making process.' On these facts, plaintiff's proofs in opposition to the motion for summary disposition thus raised a material question of fact regarding the statutory standard of gross negligence. *Id.* at 130.

Unlike the affidavits of Plaintiffs' experts here, Reno's experts' affidavits did not simply assert that Dr. Chung breached duties of care owed to Reno and that her conduct amounted to gross negligence. *Id.* at 128-129. Instead, those expert affidavits "emphatically indicate[d] that [Chung] had no medical basis for her findings and conclusions," which is evidence of conduct so reckless as to demonstrate a substantial lack of concern for whether an injury would result from giving that opinion. *Id.*

In contrast here, Plaintiffs' experts' affidavits opined that the EMS personnel breached the standard of care, by failing to take vital signs and to do a cursory physical examination. These are allegations of ordinary negligence, which are clearly distinguishable from Dr. Chung's conduct in giving testimony without any medical basis and which resulted in Reno being charged with a double murder.

Contrary to Plaintiffs' erroneous assertion, this Court's ruling in *Reno v Chung* did not and cannot unquestionably establish that where medical care is patently deficient, a motion for summary based on the gross negligence standard of MCL 691.1407(2)(c) is to be denied. This is because this Court's ruling in *Reno* was not based on "medically deficient care" at all. Instead, it was based on the defendant giving a medical opinion to a prosecutor without any factual medical basis for the opinion.

In summary, Plaintiffs contend that Schultz and Farenger failed to follow alleged protocols, failed to take his vital signs and to perform a physical examination that allegedly would have disclosed a head injury, and failed to transport him to a hospital for further treatment. These are allegations of ordinary negligence, which like the ones in *Tarlea*, *supra*, *Pavlov*, *supra* and *Ingesoulian*, *supra*, cannot sustain Plaintiffs' gross negligence claim. To the extent that they were involved, at most, Farenger and/or Schultz, could be found to have made a commonplace medical misjudgment, which does not amount to gross negligence. See, *Pavlov*, 195 Mich App at 715 and Concurring Opinion, Kelly, J, at 724; *Ingesoulian*, Ex. N, pp 1-2. Accordingly, the Court of Appeals properly concluded that the Trial Court erred by denying Defendants Schultz' and Farenger's Motion for Summary Disposition and that Schultz and Farenger are statutorily immune from Plaintiffs' tort claims under MCL 691.1407(2).

**2. The Court of Appeals also correctly held that Schultz' and Farenger's conduct was not, as a matter of law, the proximate cause of the injury.**

As explained above, to avoid the immunity provided by MCL 691.1407(2), Plaintiffs were required to establish that Schultz' and Farenger's conduct amounted to gross negligence "that is the proximate cause of the injury or damage." The Court of Appeals correctly held that Plaintiffs failed to do so. (Plaintiff's Ex. A, p 4.)

MCL 691.1407(2)(c) specifically provides that the government employee's conduct must be "**the** proximate cause" of the injury instead of just "**a** proximate cause." This Court made this clear in *Robinson v City of Detroit*, 462 Mich 439, 468; 613 NW2d 307 (2000), when it held that the Legislature's use of the words "*the* proximate cause" in MCL 691.1407(2)(c) "does not mean "*a* proximate cause."

This Court held that "the proximate cause" means "the one most immediate, efficient, and direct cause preceding the injury." *Robinson*, 462 Mich at 459. *Robinson* held that the actions of police officers chasing a car were not "the proximate cause" of injuries to passengers in the fleeing vehicles. *Id.* at 469. Specifically, this Court held:

> Further, recognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause. ... [Emphasis added by Court.] Thus we conclude that in MCL 691.1407(2)(c), the Legislature provided tort immunity for employees of governmental agencies **unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.** [Emphasis added.]
>
> Applying this construction to the present cases, we hold that the officers in question are immune from suit in tort because their pursuit of the fleeing vehicles was not, as a matter of law, 'the proximate cause' of the injuries sustained by the plaintiffs. The one most immediate, efficient, and direct cause of the plaintiffs' injures was the reckless conduct of the drivers of the fleeing vehicles. *Id.* at 462.

More recently, in *Kruger v White Lake Township*, 250 Mich App 622, 626-627; 648 NW2d 660 (2002), the Court of Appeals applied *Robinson* and explained:

> It is not enough that the gross negligence be 'a' proximate cause, it must be 'the direct cause preceding the injury.' * * * In the instant case, there were several other more direct causes of Katherine's injures than defendant officers' conduct, e.g., her escape and flight from the police station, her running onto M-59 and into traffic, and the unidentified driver hitting plaintiff decedent. Any gross negligence on defendant officers' part is too remote to be 'the' proximate cause of Katherine's injuries. As a result, the officers are immune from liability.

The Trial Court in the instant case did not review the evidence to determine if Schultz' and Farenger's alleged conduct was the one most immediate, efficient, direct cause of Costa's injuries. (Ex. M, p 15.) Instead, the Trial Court simply concluded that the fact that the EMS technicians did not take Costa for additional medical treatment created a question of fact as to whether the lack of treatment made the injury more severe. (*Id.*)

The Trial Court erred because it should have concluded that Schultz' and Farenger's conduct was not, as a matter of law, "the proximate cause" of Costa's injuries because the "one most immediate, efficient, direct cause" of his injuries was Baker's blow to his head as alleged in Plaintiffs' Complaint.

Plaintiffs' Complaint alleges:

> 8. ... The coworker, Joe Baker, reportedly struck Mr. Costa during the altercation causing him to fall backwards and strike his head on the pavement. (Emphasis added.) (Ex. A, ¶ 8.)

In addition, Baker admitted punching Costa in the face. (Ex. B, pp 61, 63, 68, 72-73, 85; Ex. G, Ex. H, Ex. I, pp 66-68, 70-72; See also, Ex. J and Ex. K.) Furthermore, it is undisputed that the Wayne County Prosecutor recommended that a warrant be issued for Joe Baker for

aggravated assault, which specifically charged Baker with inflicting "a serious or aggravated injury upon (Richard Costa)." (Ex. K.)

The Court of Appeals properly concluded that "given the undisputed evidence" of Baker's assault on Costa before Farenger and Schultz arrived on the scene "reasonable jurors could not have found that Farenger's and Schultz' actions were the proximate cause of Costa's injuries." (Plaintiffs' Ex. A, p 4.)

The Court of Appeals correctly found that the one most immediate, efficient and direct cause of Costa's injuries was Baker's assault on him. (*Id.*) Had it not been for the altercation with, and injury by Baker, Costa would not have sustained any head injury and would not have incurred the injuries of which he now complains. Accordingly, as the Court of Appeals properly concluded, the Trial Court erred by not granting summary disposition in Schultz' and Farenger's favor.

Plaintiffs seek to get around the fact that Baker's action of striking Costa is the one most immediate, efficient and direct cause of Costa's injuries by contending that Schultz' and Farenger's conduct caused neurological injuries that would not have occurred if he had been transported to a hospital. This Court should reject that argument.

On page 25 of their Application, Plaintiffs assert that "it has been alleged and will certainly be proved that, had the defendant[s] acted in an appropriate manner when they encountered Mr. Costa, the epidural hematoma which he had sustained would have been diagnosed and treated, preventing the severe injuries which Mr. Costa sustained." However, Plaintiffs cannot rely upon mere allegations of proximate cause to avoid summary disposition. MCR 2.116(G)(4); *Maiden, supra* at 120, citing *Quinto v Cross & Peters Co*, 451 Mich 358;

547 NW2d 314 (1996). As this Court explained in *Maiden*, *supra* at 121, "[a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition . . ."

In addition, the one most immediate, efficient and direct cause of Costa not obtaining additional medical treatment and transportation to a hospital was his written refusal of that treatment, while he was undisputedly conscious and able to respond appropriately to numerous questions. (Ex. B, pp 104, 105, 237; Ex. C, pp 61-62, 136; Ex. G, Run Report, p 2.)

In addition, Plaintiffs' analysis ignores the fact that Schultz and Farenger were not the only emergency personnel on the site, that they were in a basic EMT unit, which was not a transporting unit, and that when the CEMS unit, which was the more advanced and equipped and transporting unit, arrived on the scene, they became the primary unit for providing care and transportation. (Ex. B, pp 47, 51, 52, 189, 190; Ex. C, pp 24, 68; Ex. D, pp 70-71, 88; Ex. L, HEMS Protocols.) Thus, if any failure to provide additional physical examination or transport Costa to a hospital was a proximate cause of Costa's injuries, it was the CEMS unit and personnel who had responsibility for that treatment and transportation, not Schultz and Farenger.

Furthermore, with respect to Schultz, she was not even engaged in providing any medical care to Costa. (Ex. B, p 100.) As the lowest level EMT on the site, she simply was taking information from Baker. (*Id.* at 42-43, 53, 64-65.) In addition, Schultz obtained Costa's signature on the Refusal of Medical Treatment Form after he declined medical treatment. (*Id.* at 104, 105, 116, 237.) Thus, as explained, Costa made the decision to refuse to be transported to a hospital.

In addition, there was a police officer on the site. That officer permitted Costa to refuse further treatment if Costa went in the hotel and could walk into the hotel, which he did. (*Id.* at 117-118.)

Therefore, Schultz' and Farenger's conduct clearly was not "the proximate cause" of any failure to further examine Costa or to transport him to a hospital.

Moreover, Plaintiffs' Complaint merely alleges that all of the Defendants' conduct was the "one most immediate, efficient and direct cause of" Richard Costa's injury. (Ex. A, ¶ 28g.) Obviously, the conduct of multiple persons or entities acting independently cannot be the "one most immediate... cause" of Costa's injury. Plaintiffs' allegations recognize that Schultz' and/or Farenger's conduct was not the proximate cause of Costa's injuries.

Plaintiffs' reliance on *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004), is misplaced. In that action, the Court of Appeals' majority opinion concluded that Childs' conduct may be fairly described as gross negligence. *Id.* at 57-58. The Court also found that because the plaintiff presented evidence that Childs' conduct pushed the fire toward them and prevented a rescue escape, there was a question of fact as to whether his conduct was the proximate cause of the children's deaths. *Id.* at 58. Judge Griffin dissented, finding that the fire was "the" proximate cause of the children's deaths. *Id.* at 61.

There is no merit to Plaintiffs' contention that the Court of Appeals' analysis of the causation in this case is "directly at odds" with that Court's analysis in *Dean*. The facts in *Dean* are clearly distinguishable from the facts in this case. In *Dean*, the Court of Appeals concluded that the children may have been able to avoid death from the fire but for Childs' actions. Here, Plaintiffs allege that Costa was already injured by Baker before Schultz and Farenger arrived on the scene and before Farenger treated him. In addition, as explained, once the CEMS unit arrived on the scene, it had the responsibility for treating Costa and for transporting Costa for further medical treatment. Thus, no reasonable person could conclude that but for Schultz' and Farenger's conduct, Costa would not have sustained the injuries that he allegedly sustained.

Because neither Schultz' nor Farenger's conduct was the one most immediate, efficient and direct cause of Costa's injuries from Baker's assault or Costa's failure to go to a hospital, their conduct was not, as a matter of law, "the proximate cause" of Costa's injuries.

Plaintiffs contend that the Court of Appeals' opinion could have "a profound and erroneous effect on future cases" presenting proximate cause issues under MCL 691.1407(2)(c). That is not true for several reasons. First, as explained, the Court of Appeals' ruling on proximate cause in this action is not erroneous. Second, the Court of Appeals did not hold in this case that a governmental employee's gross negligence must be the "sole" proximate cause of the plaintiff's injury. Instead, the Court of Appeals applied *Robinson's* definition of proximate cause as the one most immediate, efficient and direct cause of the injury or damage. (Plaintiff's Ex. A, p 4.) Third, the Court of Appeals' proximate cause ruling merely supplements its primary ruling that Plaintiffs did not present evidence of gross negligence by Schultz and Farenger. And, fourth, each future case will present its own unique set of facts regarding causation to which other courts will be required to apply this Court's analysis and definition of proximate cause as expressed in *Robinson*, *supra* at 459. Contrary to Plaintiffs' assertions, the Court of Appeals' opinion clearly did not get the proximate cause issue wrong in this case and that opinion does not portend the doom that Plaintiffs espouse.

In summary, the Court of Appeals did not err in finding that Lisa Schultz and Donald Farenger are entitled to the protection of statutory governmental immunity afforded to them by MCL 691.1407(2). Plaintiffs failed to plead or present evidence that Schultz and/or Farenger were grossly negligent and failed to present evidence that their conduct was "the" proximate cause of Richard Costa's injuries. Thus, the Court of Appeals properly determined that the Trial Court erroneously denied Schultz' and Farenger's Motion for Summary Disposition of Plaintiffs'

claims against them. Therefore, there is no need or basis for this Court to grant Plaintiffs leave to appeal or other relief.

## II. This Court should deny leave to appeal, or other relief, from the Court of Appeals' proper affirmance of the Trial Court's denial of Plaintiffs' motion for summary disposition or default, which motion was based on Schultz' and Farenger's failure to file an affidavit of meritorious defense.

### A. There is no need for this Court to grant leave to appeal in this case to consider the remedies available to Plaintiffs because Schultz and Farenger relied on the complete defense of governmental immunity instead of filing affidavits of meritorious defense under MCL 600.2912e.

In the Trial Court, by way of a cross-motion for summary relief, and relying upon MCL 600.2912e, the Plaintiffs requested the Trial Court to:

> . . . grant Plaintiffs summary disposition or default on the issues of gross negligence and proximate cause as to Defendants Schultz and Farenger. (Plaintiffs' Brief . . . Seeking Summary Disposition against Defendants Schultz and Farenger for Failure to File Affidavits of Meritorious Defense . . ., p 81.)

The Trial Court denied Plaintiffs' motion and gave Schultz and Farenger 30 days to file Affidavits of Meritorious Defense. The Court of Appeals found that the Trial Court's rulings were consistent with that Court's opinions in *Kowalski v Fiutowski*, 247 Mich App 156, 161-163, 165; 635 NW2d 502 (2001) and *Wilhelm v Mustafa*, 243 Mich App 478, 483; 624 NW2d 435 (2000), and found that the Trial Court did not err. (Plaintiffs' Ex. A, p 5.)

Plaintiffs ask this Court to grant leave to consider the remedies available to Plaintiffs because Schultz and Farenger did not file affidavits of meritorious defense under MCL 600.2912e. This Court should decline to do so.

The only remedies that the Plaintiffs requested in the Trial Court against Schultz and Farenger were entry of a default or summary disposition. (Plaintiffs' cross-motion for summary judgment, p 13; Plaintiffs' brief supporting that motion, p 81.) On appeal, Plaintiffs did not

contend that the Trial Court abused its discretion by not imposing a sanction other than default or summary judgment as to liability on Schultz and Farenger. Therefore, Plaintiffs failed to preserve for appeal any claim that the Trial Court should have granted a remedy other than default or summary disposition against Schulz and Farenger. See, *Campbell v Sullins*, 257 Mich App 179, 192; 667 NW2d 887 (2003.)

Furthermore, Plaintiffs erroneously contend that they are entitled to summary disposition under MCR 2.116(C)(9) because Schultz and Farenger allegedly did not plead a valid defense to Plaintiffs' claim. Plaintiffs' argument completely ignores the fact that while Schultz and Farenger did not file affidavits of a meritorious factual defense under MCL 600.2912e, their affirmative defenses promptly asserted the defense of statutory governmental immunity from tort liability, which pled a complete bar to Plaintiffs' action. (Schultz' Affirmative Defenses, ¶ 4; Farenger's Affirmative Defenses, ¶ ¶ 11, 12.) As explained previously, the evidence establishes that Schultz and Farenger are immune from the tort liability alleged in Plaintiffs' medical malpractice action.

Michigan appellate courts have not specifically reviewed the relationship between the requirements of MCL 600.2912e, as applied to defendants who are governmental employees, and the immunity from tort liability afforded to governmental employees by MCL 691.1407(2), but there is no need to do so in this case because the Court of Appeals reached the correct result.

In addition, it is well established that "governmental immunity legislation 'evidences a clear legislative judgment that public and private tortfeasors should be treated differently.'" *Robinson,* 462 Mich at 459. Furthermore, the purpose of governmental immunity is to protect the governmental employee not only from liability, but also from the expense of defending the action and the action itself. See, *Mack v City of Detroit*, 467 Mich at 203, n 18; *Mitchell v*

*Forsyth*, 472 US 511 (1985). This includes the expense and burden of obtaining an expert affidavit of meritorious defenses.

Furthermore, MCL 600.2912e requires a health professional's affidavit to certify that he or she has read the complaint and all medical records supplied to him by defendant's attorney concerning the allegations in the complaint. That statute also requires that the health professional's affidavit contain, among other things, a statement of:

> (b) **The standard of practice or care** that the health professional or health facility named as defendant in the complaint claims to be applicable to the action **and that the health professional or health facility complied with that standard.**
>
> (c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the **applicable standard of practice or care**. (Emphasis added.) MCL 600.2912e(1).

Thus, the health professional's affidavit required by MCL 600.2912e must be based upon a review of medical records and must address the issue of whether the health professional or health facility named as a defendant complied with the applicable medical "standard of practice or care."

That standard of care is a distinct and lesser standard of care than the gross negligence standard set forth in MCL 691.1407(2). See, *Maiden*, *supra* at 122; *Tarlea*, *supra* at 90. Because MCL 691.1407(2) imposes a "gross negligence" standard for imposing tort liability on governmental employees when they are acting within the course of their employment and their employer is engaged in a governmental function, medical malpractice actions against governmental employees may not be based upon a breach of the less stringent "standard of practice or care." See, *Maiden*, *supra* at 122; *Tarlea*, *supra* at 90. Instead, such actions may

proceed only if they are based on the gross negligence standard of MCL 691.1407(2) and the governmental employee's conduct was "the" proximate cause of the plaintiff's injury.

Because governmental employees who were not grossly negligent and whose conduct was not "the" proximate cause of plaintiffs' injuries cannot be held liable even if their conduct breached the applicable medical "standard of practice or care," the Legislature did not intend that a governmental employee defendant's failure to comply with MCL 600.2912e requirement to file an affidavit of a meritorious defense would deprive that governmental employee of the protection of statutory governmental immunity from tort actions and liability. That is exactly the result that Plaintiffs are seeking in this case.

Also, it is clear that there is no exception to the immunity that MCL 691.1407(2) affords for failure to file an affidavit of meritorious defense under MCL 600.2912e. If this Court were to accept Plaintiffs' contention that they can avoid the governmental immunity defense that MCL 691.1407(2) affords because Defendants did not file affidavits of meritorious defenses pursuant to MCL 600.2912e, this Court, in effect, would be writing an exception into the immunity statute, which is not in that stature and which the Legislature has not enacted. Such a construction of MCL 691.1407(2) would violate the well-established rules of statutory construction that courts must enforce statutes as written. See, *Robinson*, 462 Mich at 459.[4]

Because, as explained, the immunity statute, MCL 691.1407(2), bars Plaintiffs' medical malpractice action against Schultz and Farenger, they were not required to file affidavits of

[4] Moreover, this Court has held in the context of governmental agency immunity that the basic principle is that the immunity conferred on a governmental agency is broad and that exceptions thereto are to be narrowly construed. See, e.g. *Nawrocki v Macomb County Road Comm'n*, 463 Mich 143, 158; 615 NW2d 702 (2000).

meritorious factual defenses under MCL 600.2912e or face entry of a default judgment on liability. Therefore, Plaintiffs clearly were not entitled to a default as a result of Schultz' and Farenger's assertion of governmental immunity in lieu of filing an affidavit of a factual defense under MCL 600.2912e.

The Court of Appeals properly concluded that the Trial Court did not err by denying Plaintiffs' motion for default or summary judgment. A default or summary judgment in Plaintiffs' favor was not appropriate because Schultz and Farenger stated a complete, valid defense that bars Plaintiffs' medical malpractice tort action. Accordingly, this Court should deny Plaintiffs leave to appeal or other relief.

**B. Even if Schultz and Farenger had not been immune from Plaintiffs' medical malpractice action, MCL 600.2912e did not require the Trial Court to grant Plaintiffs summary relief.**

MCL 600.2912e provides:

> (1) In an action alleging medical malpractice, within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d, the defendant shall file an answer to the complaint. Subject to subsection (2), the defendant or, if the defendant is represented by an attorney, the defendant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional who the defendant's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of meritorious defense shall certify that the health professional has reviewed the complaint and all medical records supplied to him or her by the defendant's attorney concerning the allegations contained in the complaint and shall contain a statement of each of the following:
>
> (a) The factual basis for each defense to the claims made against the defendant in the complaint.
>
> (b) The standard of practice or care that the health professional or health facility named as defendant in the complaint claims to be applicable to the action and that the health professional or health facility complied with that standard.

(c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the applicable standard of practice or care.

(d) The manner in which the health professional or health facility named as a defendant in the complaint contends that the alleged injury or alleged damage to the plaintiff is not related to the care and treatment rendered.

(2) If the plaintiff in an action alleging medical malpractice fails to allow access to medical records as required under section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after filing an answer to the complaint.

The Court of Appeals relied upon its prior published opinions in *Kowalski*, *supra* and *Wilhelm*, *supra* to conclude that the Trial Court did not err in denying Plaintiffs' motion for default or summary judgment. As the Court of Appeals correctly determined in those opinions, MCL 600.2912e does not include any language which requires entry of a default or summary judgment against a defendant who fails to file an affidavit of meritorious defense. *Kowalski*, *supra* at 165-166; *Wilhelm*, *supra* at 484. Both opinions concluded that the statute was silent on the issue of sanctions and noted that, while a prior version of MCL 600.2912e expressly provided that a trial court could strike the defendant's answer and enter a default against the defendant if the defendant failed to comply with MCL 600.2912e's affidavit requirements, that provision was eliminated from the current version of MCL 600.2912e. *Kowalski*, *supra* at 161; *Wilhelm*, *supra* at 484. *Kowalski* and *Wilhelm* also noted that the prior version of MCL 600.2912e did not make the severe sanction of default mandatory and, instead, left the matter to the trial court's discretion. See, *Kowalski*, *supra*; *Wilhelm*, *supra*.

*Kowalski* held that because MCL 600.2912e provides no remedy, the Court may infer one. *Kowalski, supra* at 162, citing *General Aviation, Inc v Capital Region Airport Authority (On Remand),* 224 Mich App 710, 715; 569 NW2d 883 (1997). Both opinions held that, while

default is a permissible remedy, it is not a mandatory remedy and that the trial court has the discretion to determine an appropriate remedy. *Kowalski*, *supra* at 165-166; *Wilhelm*, *supra* at 484-485.

In *Kowalski*, *supra* at 166, the Court of Appeals remanded the action to the trial court for it to exercise its discretion regarding an appropriate remedy for the defendant's failure to file an affidavit of meritorious defense. In *Wilhelm*, *supra* at 485-486, the Court of Appeals concluded that the Trial Court did not abuse its discretion when it did not enter the requested default judgment in plaintiff's favor, it did not impose any sanction on the defendant for failing to file an affidavit of meritorious defense, and it allowed the case to proceed on the merits.

No sanction was imposed on the defendant in *Wilhelm* because the plaintiff did not mention defendant's failure to file the affidavit during approximately two years of pretrial discovery. *Id.* at 485. In addition, the plaintiff did not include the defendant's failure to file the affidavit as an issue in her final pretrial order and the plaintiff waited until the day of trial to attempt to preclude defendant from defending the action. *Id.* The Trial Court also concluded that the plaintiff would not suffer any unfair prejudice if it allowed the case to proceed. *Id.* at 485-486.

In this case, Schultz' and Farenger's affirmative defenses promptly asserted the defense of statutory immunity from tort liability, which informed the Plaintiffs of a valid defense to their action. (Schultz' Affirmative Defenses, ¶ 4; Farenger's Affirmative Defenses, ¶ ¶ 11, 12.) Defendants, in good faith, interpreted Michigan law as allowing them to assert the governmental immunity defense in their pleadings, which is based upon gross negligence standard in MCL 691.1407(2)(c), in lieu of the inapplicable lesser "standard of practice or care" defense contemplated by MCL 600.2912e. Like Plaintiff *Wilhelm*, Plaintiffs herein did not raise the

issue of Schultz' and Farenger's failure to file affidavits of meritorious defenses until after the parties had completed a lengthy period of discovery of approximately a year.

Furthermore, the Plaintiffs did not raise the affidavits' issue until after Schultz and Farenger had filed their motion for summary disposition. As explained, that motion established that Schultz and Farenger are immune under MCL 691.1407(2) from Plaintiffs' tort claims against them.

In addition, Plaintiffs did not claim in their 81-page response to Defendants' Motion for Summary Disposition and Cross-Motion for Summary Disposition, in their Court of Appeals' brief, or their present Application for Leave to Appeal, that they were prejudiced by Schultz' and Farenger's failure to file affidavits of meritorious defenses under MCL 600.2912e under the circumstances of this case.

Moreover, Plaintiffs cannot establish any such prejudice because Schultz and Farenger had promptly informed Plaintiffs of their affirmative defense of governmental immunity with their Answers to Plaintiffs' Complaint, participated in discovery, and moved for summary disposition on that defense. The Trial Court did not abuse its discretion by denying Plaintiffs' cross-motion for summary relief in this case where Plaintiffs failed to contend or establish that they were unfairly prejudiced by Defendants' failure to file affidavits of meritorious defenses under MCL 600.2912e. See *Wilhelm, supra* at 485-486.

Under the circumstances of this case, the Court of Appeals did not err by finding that the Trial Court did not abuse its discretion by not imposing any sanctions on Schultz and Farenger. See, *Id.*

### C. Plaintiffs failed to establish that the Court of Appeals erred by affirming the Trial Court's denial of their motion for default or summary judgment.

Plaintiffs admit that no Michigan appellate court has held that a trial court must enter a default against a defendant who does not file a timely affidavit of meritorious defense under MCL 600.2912e. (Plaintiffs' Application, pp 33-34.) Instead, they rely upon this Court's opinion in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000).

That opinion is distinguishable and not controlling because it addressed only a plaintiffs' requirement to file and affidavit of merit under MCL 600.2912d. *Scarsella* did not address a defendant's requirement to file an affidavit of meritorious defense under MCL 600.2912e, which is at issue in this case. In *Scarsella*, this Court concluded that, "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." 461 Mich at 549. This Court affirmed the dismissal of Plaintiff Scarsella's complaint because he failed to file an affidavit of merit with his complaint before the limitation period had expired. *Id.* at 548, 553. Neither a plaintiff's failure to file an affidavit of merit under MCL 600.2912d or the tolling of a limitations period is at issue in this case.

Plaintiffs seek to avoid the obvious distinction between the issues in *Scarsella* and this case by contending that MCL 600.2912e's affidavit requirement is a "mirror image" of MCL 600.2912d's affidavit requirement. However, the only authority that Plaintiffs cited for that proposition is *Kowalski*, *supra*, and that opinion did not hold that those affidavit requirements were mirror images of each other. In fact, *Kowalski* held that:

> . . . **the defendants in a medical malpractice case are not in the same situation as the plaintiffs.** First, they are not racing the statute of limitations clock; their interest in prolonging the suit is very different from the plaintiff's need to meet the statutory deadline. **Second, the statutory provisions and language applying**

> **to the defendants is similar, but not identical, to that applying to plaintiffs** . . . (Emphasis added.) *Id.* at 165.

*Kowalski, supra* at 161, also explained additional distinctions between MCL 600.2912e and MCL 600.2912d as follows:

> MCL 600.2912e is silent in regard to a sanction for noncompliance with the ninety-one-day time limit, and nothing in that statute expressly permits or forbids an extension of time. In contrast, the statutory provision governing a plaintiff's affidavit of merit, MCL 600.2912d, is silent concerning possible sanctions, but it expressly allows a plaintiff to have an additional twenty-eight days in which to file the affidavit of merit if good cause is shown. * * *

*Kowalski* does not support Plaintiffs' mirror-image argument. Instead, *Kowalski* supports the conclusion that MCL 600.2912d and MCL 600.2912e are not identical and serve different purposes. *Kowalski*, *supra* at 161, 165. *Wilhelm*, *supra* at 484 also supports that conclusion.

Moreover, Plaintiffs fail to point out that the Court of Appeals has not treated the affidavit requirements in MCL 600.2912d and MCL 600.2912e as being "mirror images." See e.g., *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 714; 620 NW2d 319 (2000); *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998), aff'd 461 Mich 547; 607 NW2d 711 (2000); *Kowalski*, *supra*; *Wilhelm*, *supra*.

As explained, in *Kowalski*,[5] *supra* at 165-166 and *Wilhelm*, *supra* at 484-485, when reviewing MCL 600.2912e's affidavit requirement, the Court of Appeals held that striking the defendant's answer and entering a default was not mandatory and that the trial court had

[5] Plaintiffs attempt to distinguish *Kowalski* from this case because *Kowalski* involved entry of a default judgment as opposed to entry of a summary judgment. (Plaintiffs' Application for Leave to Appeal, p 34, n 2.) However, Plaintiffs' cross-motion for relief in this case sought entry of a default or summary disposition. Moreover, there is no meaningful distinction between entry of a summary judgment in Plaintiffs' favor on liability and entry of a default judgment on liability issues for failure to file an affidavit. The result is the same under either procedure; Defendants would be precluded from presenting liability defenses.

discretion concerning any remedy that a plaintiff may have as the result of a defendant's failure to file an affidavit of meritorious defense.

However, in *Holmes*, *supra*, at 706, when addressing MCL 600.2912d's affidavit requirement, the Court of Appeals held that a medical malpractice complaint filed by a plaintiff without an affidavit of merit is insufficient to commence the lawsuit and, thus, does not toll the applicable limitation period for bringing the action.[6] The Court held that when this occurs prior to the expiration of the limitation period, dismissal without prejudice is an appropriate remedy, which leaves the plaintiff with an opportunity to refile the complaint together with the affidavit of merit. *Id.* The Court also held that if the claim is time barred, the complaint should be dismissed with prejudice.[7] *Id.* at 706-707. The Court of Appeals reached similar conclusions in *Scarsella*, 232 Mich App 61, which this Court subsequently adopted in its opinion in that case. 461 Mich at 548.

There are logical reasons for concluding that different remedies are available under MCL 600.2912d and MCL 600.2912e. As *Kowalski* recognized, it is the plaintiff who has the obligation of filing the action within the limitations period. Because MCL 600.2912d requires filing of the affidavit to commence the action, failing to file the affidavit with the complaint within the limitations period warrants dismissal of the action because it is time barred. In addition, as explained, if the limitations period has not expired, the dismissal would be without prejudice and the plaintiff could refile the action.

In contrast, no limitations period applies to a defendant's defense of a medical malpractice action. Also, if a Court was required to default a defendant for not filing an affidavit

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[6] *Holmes*, *supra*, is consistent with this Court's opinion in *Scarsella*, *supra*.

of meritorious defense under MCL 600.2912e, the defendant would never have an opportunity to correct that deficiency because the default would never be "without prejudice." Furthermore, in some cases, such as this one, the defendant may have a complete defense to the action itself, such as immunity, which excuses the defendant from the affidavit requirement of MCL 600.2912e because the action is barred.

In summary, this case presents a prime example as to why the Plaintiffs' affidavit requirement in MCL 600.2912d should not be interpreted as the mirror image of the Defendants' affidavit requirement in MCL 600.2912e. MCL 600.2912d required Plaintiffs to file an affidavit of merit with their complaint to commence this action. The governmental immunity statute does not excuse Plaintiffs' requirement to do so. However, as explained, MCL 691.1407(2) provides Schultz and Farenger with a complete immunity defense that bars Plaintiffs' medical malpractice action; and, therefore, Schultz and Farenger are not required to present factual defenses to that action, by way of an affidavit, or otherwise.

This Court should deny Plaintiffs leave to appeal or other relief because the Court of Appeals properly affirmed the Trial Court's order denying Plaintiffs a default or summary judgment against Schultz and Farenger. Consistent with the Court of Appeals' opinions in *Wilhelm* and *Kowalski* and the purposes of MCL 691.1407(2) and MCL 600.2912e, the Trial Court was not required to provide that remedy to the Plaintiffs, particularly, where MCL 691.1407(2) protects Schultz and Farenger from Plaintiffs' medical malpractice action.

[7] *Holmes* noted that, in *Scarsella*, 461 Mich at 553, n 7, this Court left open the possibility that a plaintiff's timely filed, but grossly nonconforming affidavit might possibly be sufficient to commence a medical malpractice action. 242 Mich App at 713, n 4.

## RELIEF SOUGHT

Defendants-Appellees Lisa Schultz and Donald Farenger respectfully request that this Honorable Court deny Plaintiffs' Application for Leave to Appeal and alternative request for peremptory relief.

SECREST WARDLE

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